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No. 01-688

IN THE

Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,
Petitioner,

v.

URSULA GIBSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the supplemental jurisdiction statute, 28 U.S.C. § 1367, authorizes a federal district court to take supplemental jurisdiction over the claims of unnamed members of a class, where prior to class certification the named plaintiffs seek punitive damages in excess of the minimum amount necessary for the court to assume original jurisdiction over the named plaintiffs' claims.

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BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL AS AMICUS CURIAE IN SUPPORT OF PETITIONER

This brief is filed on behalf of the Product Liability Advisory Council as *amicus curiae* in support of petitioner, with the written consent of the parties.[1]

[1] No counsel for a party to this case authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

INTEREST OF AMICUS CURIAE

The Product Liability Advisory Council ("PLAC") is a nonprofit association with over 100 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 525 briefs as amicus curiae in both state and federal courts, including a brief filed in support of respondents in *Free v. Abbot Laboratories, Inc.*, 529 U.S. 333 (2000), which presented the same question that is at the heart of this case. PLAC's filing in *Free* reflects its members' particular interest in the rules governing the removal to federal court of putative class actions filed in state courts. PLAC's members have observed the marked increase in state-court class actions over recent years, and many have first-hand experience with the varied practices of numerous state courts with respect to class certification. For these reasons, PLAC and its members have a very real and concrete interest in the resolution of the questions presented by the petition in this case.

INTRODUCTION

The petition for a writ of certiorari raises a set of interrelated questions of federal jurisdiction, questions with significant consequences for class action litigation and punitive damages claims in both federal and state courts. One aspect of the decision below would make it easier for federal courts to assume jurisdiction over the kinds of nationwide class actions that, we submit, *ought* to be in federal and not state court. Yet by offering plaintiffs an apparently easy end run around the court's holding, the decision below simply closes

one important one loophole to the assertion of federal jurisdiction, while opening yet another.

This Court should grant the writ and close both loopholes for once and for all. The loopholes are, after all, entirely court-made; the applicable jurisdictional statutes are clear and unambiguous. What may be less clear are the consequences of obstacles to federal court jurisdiction like the no-punitive-damage-aggregation rule adopted by the court below, and like the even more sweeping no-supplemental-jurisdiction rule adopted by several other circuits. The problem, as members of amicus PLAC can attest, is that certain state court systems have failed to respond with adequate regard for the rights of those haled into court in the new era of mass litigation. That failure that has resulted in the establishment of a few local courts as the forums of first resort for a great many class actions involving issues and problems of nationwide import. Proper resolution of the controversies implicated by the decision below is urgently needed to clear away a key decisional barrier to federal court jurisdiction in cases of truly national significance.

REASONS FOR GRANTING THE WRIT

As the petition persuasively demonstrates, the plain terms of the supplemental jurisdiction statute, 28 U.S.C. § 1367, require a federal district court to assume jurisdiction over a class action that includes claims that do not satisfy the minimum amount in controversy requirement of the diversity statute, 28 U.S.C. § 1332, so long as the action includes at least one plaintiff with monetarily sufficient claims (and citizenship diversity requirements are met). Amicus PLAC filed a brief in *Free v. Abbot Laboratories, Inc.*, 529 U.S. 333 (2000), making the same argument.

In the time since the Court in *Free* sought unsuccessfully to resolve the § 1367 interpretive question at the heart of this case, the conflict in the courts has only deepened, uncertainty has only intensified, and wasteful jurisdictional litigation has

only proliferated. Meanwhile, the dockets of certain state courts have continued to swell with nationwide class actions that those courts have proved unable or unwilling to manage appropriately – actions that in many cases would be removed to federal court if the plain language of § 1367 were the governing rule, as it should be. Final resolution of this controversy is long overdue. The Court should take the opportunity this case presents to correct the error of several circuits in refusing to follow the plain language of § 1367, and the failure of the court below to apply that plain language to punitive damages claims.

I. REVIEW SHOULD BE GRANTED TO SETTLE A CONTROVERSY THAT HAS PREVENTED FEDERAL COURTS FROM ASSUMING JURISDICTION OVER CASES THAT OUGHT TO BE HEARD IN THE COURTS OF THE NATION

The petition sets forth the circuit conflict over the § 1367 interpretive issue addressed by the decision below, as well as the historical controversy over application of the law in the punitive damages context. Pet. 8-25. We will not rehearse those controversies here. Rather, it is our purpose to set forth the broader context of state-court class-action litigation in which the controversies have arisen, a context that demonstrates the need for this Court to ensure that rules – such as § 1367 – authorizing federal jurisdiction in appropriate cases are strictly followed.

It is an unfortunate reality that not every state – or every state court – has responded equally to the challenges of the modern complex litigation era. While it cannot be said that every local court in every state has proved incapable of handling the procedural fairness difficulties inherent in mass litigation, an identifiable pattern of problems has emerged.

First, there is now a "substantial body of data confirming that certain state courts have become 'magnets' for multistate and nationwide class actions." John H. Beisner & Jes-

sica Davidson Miller, *They're Making a Federal Case Out of It . . . In State Court*, Manhattan Institute Civil Justice Report 3, at 27 (Sept. 2001) ["*Manhattan Institute Report*"]. This problem poses a particular concern for PLAC's members, most of whom sell products in a national market, and thus risk being subjected to suit in virtually any state court that acts hospitably towards class actions. Studies conducted by the Manhattan Institute and the RAND Institute for Civil Justice have confirmed that certain state courts are indeed disproportionately likely to certify nationwide classes than are the federal courts or other state courts, and have thus made themselves favorites of the class action plaintiffs' bar. *See id.* at 7-9; Exec. Summary, RAND Institute for Civil Justice, *Class Action Dilemmas*, at 7 (1999); *see also* Glenn A. Danas, Comment, *The Interstate Class Action Jurisdiction Act of 1999: Another Congressional Attempt to Federalize State Law*, 49 Emory L.J. 1305, 1320 (2000) ("many commentators believe that there is indeed a trend toward state-law damages class actions being filed in state courts"). In fact, a recent survey of 100 Fortune 500 companies with nationwide commercial interests revealed that a substantial proportion of class actions were filed in just a few states.[2] The *Manhattan Institute Report* found "an inexplicably large number of class actions" filed in three local courts – Madison County, Illinois; Jefferson County, Alabama; and Palm Beach County, Florida. *Manhattan Institute Report*, *supra*, at 10. And one state court judge certified almost as many cases for class action treatment during 1996-97 as were certified during 1997 by all approximately 900 federal district

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[2] *See* Federalist Society, *Analysis: Additional Findings*, I Class Action Watch 3, at 3 (Fall 1999). The survey found that 54 percent of the reported class actions appeared in just five jurisdictions – Alabama, California, Louisiana, Ohio, and Texas – in 1993, and that by 1998 the number had jumped to 69 percent.

judges combined.[3] As the RAND report concluded, "class action attorneys 'shop' for judges who are favorable to class actions," and such attorneys "find them most often in state courts." *Class Action Dilemmas*, *supra*, at 7.[4]

Second, it turns out, unsurprisingly, that certain state courts are class action magnets for a reason: they are less likely than other state courts, and much less likely than the federal courts, to ensure that defendants receive fair treatment in mass litigation. Elemental concepts of fairness and due process require that mass litigation devices such as the class action include procedures to ensure each defendant "the opportunity to present his case and have its merits fairly judged." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). Unfortunately, to many state courts have not taken seriously the duty to ensure class action defendants – often out-of-state corporate defendants – the protections of due process. *See, e.g.*, *H.R. 3789 Subcommittee Hearing*, *supra* note 4, at 22 (attached testimony of John W. Martin, Jr.) ("many local courts are willing to certify for class action treatment cases that do not comport with the basic class action requirements. . . . Indeed, some state courts actually have certified proposed classes identical to ones rejected outright by federal courts [on due process grounds]."). For example, the congressional hearings revealed a pattern among

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[3] *See Mass Torts and Class Actions: Hearing before the Subcomm. on Intellectual Property and the Courts of the House Comm. on the Judiciary*, 105th Cong. (1998) (statement of Dr. John Hendricks), *available at* http://www.house.gov/judiciary/41164.htm.

[4] *See also Hearing Before the Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary on H.R. 3789* ["*H.R. 3789 Subcommittee Hearing*"], 105th Cong. 8 (1998) (testimony of Sheila Birnbaum, Esq.) ("Plaintiff class action lawyers will typically seek out 'select' state court judges who quickly certify class actions with seemingly little or no consideration to the appropriateness of class certification under the rules or the due process rights of the defendant and absent class members.").

some state courts of certifying classes on the same day the complaint was filed – *before the defendant was even served with the complaint*. *Id.* Such abuses of the class action device have serious consequences. The issuance of a class certification order immeasurably alters the nature of the litigation, most particularly by dramatically increasing the risks to which the defendant is exposed, and, consequently, the incentives for settling even the most nonmeritorious actions.

Third, the cavalier treatment of such litigation in certain state courts has spawned a more general increase in the amount of complex litigation already burdening society. Class action filings in state courts increased some 1,315 percent over the past decade, as compared to an increase of 340 percent in the federal courts over the same period. Federalist Society, *Analysis: Class Action Litigation*, I Class Action Watch 2, at 3 (Spring 1999). Another commentator has observed a more recent "doubling or tripling of the number of putative class actions," an increase "concentrated in the state courts." D. Hensler, *Preliminary Report of the RAND Study of Class Action Litigation* 15 (May 1, 1997). There is little doubt that many of these class actions would not have been filed in the absence of forums willing to stretch accepted mass litigation procedural protections well past the snapping point.

Fourth, there is a growing body of evidence that many state court class actions impose improper burdens not only on corporate defendants, but also on consumer class members themselves. In recent congressional hearings, witnesses have urged that state court class actions primarily benefit class counsel, not the class members.[5] Those charges

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[5] *Class Action Lawsuits: Examining Victim Compensation and Attorneys' Fees, Hearing before the Subcomm. on Administrative Oversight and the Court of the Senate Judiciary Comm.*, 104th Cong. (1997) (statement of Sen. Herb Kohl); *S. 353: "The Class Action Fairness Act of 1999," Hearing before the Subcomm. on Administrative Oversight and*

are bolstered by case reviews in the RAND study revealing that in non-personal injury class actions filed in state courts, class counsel often (if not typically) receive more dollars from settlements or verdicts than the thousands of persons in the class *combined*. *See Class Action Dilemmas, supra,* at 23.

Fifth, improper state court class actions can have the perverse effect of thwarting the proper application of state law. As former Acting Solicitor General Walter E. Dellinger testified before the House Judiciary Committee,

> many state courts faced with interstate class actions . . . have undertaken to dictate the substantive laws of other states by applying their own laws to all other states, which results essentially in a breach of federalism principles. . . . And because the state court decision has binding effect everywhere . . . the other states . . . have no way of revisiting the interpretation of their own laws.[6]

For example, in one recent nationwide class action, a local Illinois court applied Illinois law in a nationwide class action to allow a jury to find an insurance company's practice to be fraud – to the tune of $1.2 billion in punitive damages – despite protestations from other states' insurance officials that the practice condemned by the Illinois court was actively *encouraged* by the laws of their states. *See Avery v. State Farm Mut. Auto Ins. Co.*, 746 N.E.2d 1242, 1254 (Ill. Ct. App. 2001). Nevertheless other similarly situated companies immediately stopped the practice, for understandable fear of

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the Courts of the Senate Judiciary Comm., 106th Cong. (1999) (statements of Sen. Herb Kohl & John P. Frank).

[6] *H.R. 1875, The Interstate Class Action Jurisdiction Act of 1999, Hearing before the House Comm. on the Judiciary* (1999) (statement of Hon. Walter E. Dellinger) ("Dellinger Testimony"), *available at* http://www.house.gov/judiciary/dell0721.htm.

being hammered by exemplary damages in Illinois courts. Thus a single elected county judge in Illinois was able to "overturn insurance regulations or state laws in New York, Massachusetts, and Hawaii, among other places," essentially establishing "what amounts to a national rule on insurance." Matthew J. Wald, *Suit Against Auto Insurer Could Affect Nearly All Drivers*, N.Y. Times, Sept. 27, 1998, § 1, at 29.

Of course, granting the writ in this case will not solve all of the foregoing problems with class action litigation in certain states. But there is no avoiding the fact that the emerging class action litigation crisis has resulted in part from the fact that the doors of the federal courts are often closed to class actions, even those of nationwide consequence. And the old ancillary jurisdiction rule prohibiting consideration of monetarily insufficient class members claims is among the more significant obstacles to federal court jurisdiction over nationwide mass litigation cases. *See Manhattan Institute Report*, *supra*, at 2-3. This case presents the opportunity to inter that rule and open the federal courts to more of the cases that truly ought to be there. If, as we believe, § 1367 would require federal courts to assume jurisdiction in a substantial number of cases in which it is currently denied by many circuits, this Court should grant certiorari and say so now. Continued litigation over this basic jurisdictional question serves no one's interests.

II. THIS COURT SHOULD GRANT REVIEW TO MAKE CLEAR THAT CLASS ACTIONS CAN BE REMOVED WHERE THE NAMED PLAINTIFFS SEEK PUNITIVE DAMAGES IN EXCESS OF $75,000

The general question of how to interpret the supplemental jurisdiction statute, 28 U.S.C. § 1367, arises in this case in the particular context of a putative class seeking punitive damages against a large, out-of-state corporate defendant. The concerns noted in the previous section about fairness to

out-of-state defendants, particularly corporate defendants, are significantly magnified in that context. This Court has previously acknowledged both that there is an inherent risk that a punitive damages award may be "influenced by prejudice against large corporations," and that the risk of such bias is "of special concern when the defendant is a nonresident." *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 463 (1993) (plurality op.); *see id.* at 493 (O'Connor, J., dissenting) (for jurors in a punitive damage case, "the temptation to transfer wealth from out-of-state corporate defendants to in-state plaintiffs can be quite strong"). As the Court put the point in *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994):

> Punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.

It is all the more reason, then, that § 1367 should be interpreted in accordance with its plain meaning in the punitive damages context, *i.e.*, to allow a federal court to assert supplemental jurisdiction over a class action where at least one class member seeks punitive damages exceeding the minimum amount-in-controversy requirement of the diversity statute, 28 U.S.C. § 1332.[7] The court of appeals in this case

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[7] It is particularly ironic that the amount-in-controversy requirement of the diversity statute has operated to deny out-of-state defendants access to federal courts in the largest class actions, inasmuch as the very point of the diversity statute since the founding era has been to assure that "non-resident litigants" have access to "courts free from susceptibility to potential local bias." *Guaranty Trust Co. v. New York*, 326 U.S. 99, 111 (1945) (citing *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809)).

did hold that the plain meaning of § 1367 governs as general matter, thus abrogating this Court's holding in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), that a court may not assert, through Rule 23, ancillary jurisdiction over any monetarily insufficient claims of unnamed class members. For the reasons stated in the petition, and in PLAC's brief in *Free v. Abbott*, that aspect of the court's holding was correct.

But the court nevertheless held that federal jurisdiction was improper here. As to compensatory damages claims, the court held, the claims of unnamed plaintiffs may *not* be considered for purposes of establishing original jurisdiction under § 1367. Pet. App. 20a. As to punitive damages claims, by contrast, the court held that a district court *must* consider the claims of unnamed plaintiffs. *Id.* at 31a. The distinction drawn by the court in the treatment of unnamed class members' compensatory damages, on the one hand, and unnamed class members' punitive damages claims, on the other, is more than merely ironic; it is a misapplication of § 1367 to the punitive damages context.

Section 1367 provides that if the federal court has "original jurisdiction" over any claim in a civil action, the court may assume "supplemental jurisdiction" over all other transactionally related claims in the action. *See City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 165 (1997). As the court of appeals correctly recognized, a district court merely needs to identify one monetarily sufficient claim over which it can assert original jurisdiction; having done that, the court can then assert supplemental jurisdiction over the claims of all other class members, even if they are monetarily insufficient. Pet. App. 11a. When the five named plaintiffs in this case amended their complaint to seek punitive damages, the amount-in-controversy on *their own claims* at that point well exceeded $75,000. Thus the district court had "original jurisdiction" over those claims, and it should have followed as a matter of course under § 1367 and *City of Chicago* that the

court could assume supplemental jurisdiction over the remaining, unnamed members of the class.[8]

We therefore agree with petitioner that, "to the extent the court felt a need to divide the request among plaintiffs, it should have attributed the punitive damages claims to the named plaintiffs in ascertaining the amount-in-controversy." Pet. 23. No other course is consistent with § 1367. Thus, while we also agree with petitioner that punitive-damages claims are properly treated as "indivisible in nature," *id.*,[9] the

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[8] It is irrelevant that the inclusion of unnamed plaintiffs' claims, when added by the certification of a class, might retroactively reduce the proportionate allocation of a predicted punitive damages recovery to the named plaintiffs. The propriety of a federal court removal is determined on the basis of the complaint as filed in state court, *Wisconsin Dep't of Corrections v. Schact*, 524 U.S. 381, 390 (1998), and by the court of appeals' own reasoning, under current law only the claims of the named plaintiffs are part of "a class action, when filed." Pet. App. 20a. Thus on the court of appeals' own theory the amount of punitive damages sought by the named plaintiffs cannot be diluted by the claims of plaintiffs not yet before the court.

[9] The court of appeals' error on this point is equally demonstrable. The court held that punitive damages are not a "common and undivided interest" because "the plaintiffs in this case could sue [petitioner] individually on all the causes of action alleged in the current complaint," and "[i]f they did so, nothing would preclude them from seeking and recovering punitive damages individually." Pet. App. 31a. According to the court, the availability of individual punitive-damage suits "directly refutes the argument that there is some unitary res to which the plaintiffs jointly claim a right." *Id.* at 31a-32a. The court is quite wrong: what the possibility of individual suits actually establishes is that each plaintiff's individual claim for punitive damages *exceeds* the jurisdictional minimum. That is so because if each plaintiff sued individually, as the court hypothesizes, he or she would certainly assert a claim for punitive damages claim greater than $75,000. Looking at the claims individually thus confirms (not refutes) the monetary sufficiency of plaintiffs' punitive damages claims. Another way to look at it is to say that any one plaintiff who sued would be seeking whatever amount is deemed necessary to serve society's goals of punishing and deterring the conduct at issue, *see BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568 (1996); a class action simply means that several plaintiffs have united to pursue that

class-action/removal/supplemental-jurisdiction issues presented here can be resolved on an even simpler ground. This class action was properly removed because, upon removal, the district court had original jurisdiction over the named plaintiffs' claims for punitive damages, and on that basis could assert supplemental jurisdiction over the unnamed class members' claims pursuant to § 1367.

PLAC urges the Court to grant the writ and clarify that the no-punitive-damage-aggregation rule applied below – if valid at all – does not defeat federal jurisdiction over a punitive damages class where the named plaintiffs' own punitive damages claims, viewed without regard for the existence of unnamed members' claims in a purported but uncertified class, exceed the jurisdictional minimum.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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same amount. That amount – i.e., the amount necessary to punish and deter – is the "res" in which all injured plaintiffs have a common interest, whether it is pursued by one, some, or all of them in a given case. *Cf. Davies v. Corbin*, 112 U.S. 36, 41 (1884) (claim to tax is common and undivided where "each relator has the right to have the whole tax collected for the purpose of distribution among all the creditors"); *Shields v. Thomas*, 58 U.S. (17 How.) 3, 4 (1855) (claim is common and undivided where plaintiff seeks "a portion of the common fund to be distributed among the claimants," as opposed to "the amount due to himself on his own separate contract"). And when a punitive damage award *is* pursued jointly, the defendant of course has no stake as to how that award is distributed among the plaintiffs – establishing that the amount in controversy between the parties is the *total amount of punishment*, not any individual plaintiff's *share* in that amount. *See Davies*, 112 U.S. at 40 (claim is common and undivided where it is "perfectly immaterial" to defendant "how it is divided" among plaintiffs); *Shields*, 58 U.S. (17 How.) at 4 (same).

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